United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO. 76-1200

(To be argued by Mr. Andrew A. Bucci)

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P/S

United States Court of Appeals
For the Second Circuit

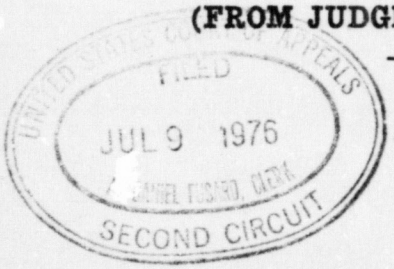
UNITED STATES OF AMERICA,
APPELLEE,

v.

ANDREW A. BUCCI,
DEFENDANT, APPELLANT.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR DEFENDANT-APPELLANT
(FROM JUDGMENT AND SENTENCE)



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QUESTION PRESENTED

I. The Trial Court's error in denying Appellant Bucci's Motions (A) For Judgment of Acquittal due to the insufficiency of the evidence to sustain a conviction,

(1) at the conclusion of the Government's Case, and
(2) at the conclusion of all of the evidence, and
(3) following conviction to set aside the verdict and enter Judgment of Acquittal, and

(B) For a New Trial, Pursuant to Rules 29(a), (b) (c), and 33, respectively, of the Federal Rules of Criminal Procedure, deprived the Appellant of his guarantees pursuant to the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On March 21, 1975, a Federal Grand Jury sitting at Hartford, Connecticut, returned an indictment against Andrew A. Bucci charging him with one count of conspiring to violate the civil rights of one Daniel LaPolla, death resulting, in violation of Title 18, Section 241, U.S.C.A.; three substantive counts in violation of Title 18, Section 1623, U.S.C.A., and one conspiratorial count in violation of Title 18, Section 1623, U.S.C.A.

Appellant Bucci was acquitted by a jury of Count One on September 3, 1975; on January 30, 1976—convicted by a jury on Counts Two, Three, Four and Five, all at Hartford, Connecticut. On March 25, 1976, a Motion for Judgment of Acquittal N.O.V. was granted as to Counts Two, Three and Four and denied as to Count Five. The defendant's motion was denied. The defendant was then given a Ten (10) day suspended sentence.

STATEMENT OF FACTS

The Government's witness, William L. Marrapese, took the witness stand and testified that he and Appellant Bucci conspired in that he (Marrapese) would take the witness stand in his own defense, and, under oath, would give false testimony in his trial entitled *United States* v. *William L. Marrapese,* Ind. No. H-264.

The overt acts that the Government alleges were committed consist of each of the acts complained of in substantive Counts Two, Three and Four. Said acts are that:

(1) The first time he (Marrapese) ever talked to Daniel LaPolla about stolen guns was in March, 1972;

(2) He (Marrapese) had no involvement in or connection with the transportation of Thirty (30) M-16 Machine Guns from Rhode Island to Connecticut relating to Daniel LaPolla; and

(3) The first time he saw the residence of Daniel LaPolla was in June or July of 1972.

A Judgment of Acquittal N.O.V. was granted on said Counts Two, Three and Four in that the Trial Judge decided that the Government failed in its proof that the witness Marrapese was under oath when he made said answers in the Trial of Indictment No. H-264 as above described.

A Motion for Judgment of Acquittal N.O.V. on the conspiracy count (No. 5) was denied. A Motion for a New Trial on this count was also denied.

ARGUMENT

I. The Trial Court's Error in Denying Appellant Bucci's Motions (A) For Judgment of Acquittal Due to the Insufficiency of the Evidence To Sustain a Conviction, (1) at the Conclusion of All of the Evidence, and (2) Following Conviction To Set Aside the Verdict and Enter a Judgment of Acquittal and (B) For a New Trial, Pursuant to Rules 29(a), (b), (c), and 33, Respectively, of the Federal Rules of Criminal Procedure, Deprived the Appellant of His Guarantees Pursuant to the Sixth and Fourteenth Amendments to the United States Constitution.

The Trial Court denied Appellant Bucci's Motion For Judgment of Acquittal on the conspiracy count due to the insufficiency of the evidence presented by the Government

to sustain a conviction pursuant to Rule 29(a), 29(b), 29(c) and 33 of the Federal Rules of Criminal Procedure.

Appellant Bucci respectfully contends that a comparison of (1) the 'Facts Presented' by the Government at trial with (2) the 'Elements of Each Offense' as set forth in the Fifth Count of the Indictment, indicates a complete insufficiency of evidence presented to sustain a conviction of such offenses.

Concededly, the scope of judicial review of the sufficiency of the evidence in criminal cases utilized within the Court of Appeals for the Second Circuit, viz., the so-called "Second Circuit Rule," as crystallized in the opinion of Judge Clark in *United States* v. *Valenti*, (CCA 2d) 134 F.2d 362, 364, *cert. den.*, 319 U.S. 761 (1943), is that the standard of proof beyond a reasonable doubt is not incorporated into the legal test.

However where following the Court's denial of the defendant's motion for judgment of acquittal at the conclusion of the Prosecution's case-in-chief, the defense goes forward with its own evidence, the Court will consider all of the evidence when ruling on a second defense motion for judgment of acquittal at the conclusion of all of the evidence. In determining the sufficiency of the evidence at the close of the trial, subsequent to verdict, or on appeal, the Trial or Appellate Court as the case may be, looks to the entire record and not simply to the evidence offered by the Government on its direct case. *United States* v. *Goldstein*, (CA 2d, 1948), 168 F.2d 666. While a motion for acquittal requires the Court to take the evidence in a "light most favorable to the Government," a motion to set aside the verdict as against the weight of the evidence allows the Court to consider the credibility of Government witnesses. As Judge Holtzoff stated in *United States* v. *Robinson*, (DDC 1947) 71 F. Supp. 9, 10-11:

> "On a motion for a new trial on the ground that the verdict is against the weight of the evidence, the power of the Court is much broader. On such an application, the Court may weigh the evidence and consider the credibility of witnesses. If the Court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted" . . .

An Appellate Court may remand for a new trial after reversing a conviction for insufficiency of the evidence predicated on 28 U.S.C., Section 2106. (See *Bryan* v. *United States*, 338 U.S. 552, 70 S. Ct. 317 (1950).

On April 8, 1976, in sentencing the Appellant Bucci to a 10-day suspended sentence, the Trial Court indicated that it did not believe the Government witness Marrapese.

This finding alone, it is respectfully submitted, is sufficient ground for this Honorable Court to conclude that the verdict was contrary to the weight of the evidence. This Court could, therefore, remand this matter for a new trial.

The Appellant argues that a Motion for Judgment of Acquittal should have been granted as to Count 5. The Appellant bases his contention on two premises: (1) That the three overt acts mentioned in the indictment indicate that the witness, Marrapese, testified under oath and (2) That the Congressional intent in enacting 18 U.S.C. § 1623 was to make it a crime for a person to make two irreconcilably inconsistent statements under oath.

The evidence as indicated by the Trial Judge's decision indicates that it was not proven that the witness's testimony was given under oath.

Title 18 U.S.C., § 1623 requires that a witness make two irreconcilably inconsistent statements under oath. As Senator McClellan has said,

> "Under present law, even if a witness makes two statements which are so patently contradictory that one or the other must be false, the prosecution must nevertheless prove which of the statements is false and then prove an intentional falsehood." *46 Notre Dame L. R. 94.*

In the instant case, the Government alleges that the witness, Marrapese, testified at the "gun trial" so-called (H-264) and that such testimony was false (although it was never proven that the witness was under oath). The Government further avers that in front of the Grand Jury in this case, the witness, Marrapese rendered an irreconcilably inconsistent statement. The defendant, Bucci, is charged with conspiracy to do all this. Thus, in order for Bucci to be guilty as charged he must have accomplished the following:

(1) agreed with Marrapese to lie at the gun trial.
(2) agreed with Marrapese to lie or tell the truth at the Grand Jury.

The evidence and records will demonstrate that after the "gun trial" Bucci represented Marrapese only for a short time and that he did not participate as counsel in Marrapese's 18 U.S.C. § 241 trial. He had withdrawn as Counsel. At the time Marrapese appeared before the Grand Jury there is no evidence that he even talked to Bucci. Consequently, the only manner or fashion that Bucci could have been engaged in this conspiracy would have been through transcendental meditation. Bucci, to have been guilty of this crime charged would have had to say, "Billy, lie at the gun case trial and if that doesn't work, maybe someday in the future you'll be charged with something else — maybe a violation of 18 U.S.C. § 241. Then

if you are tried and convicted of that, after you are in jail for 4 or 5 months, go before the Grand Jury and tell them you lied." It is submitted that there may be other Federal statutes which cover the conduct alleged, but 18 U.S.C. § 1623 does not unless without premise you infer the foregoing.

The Trial Judge, in granting Appellant's motion, made a finding that the substantive Counts Two, Three, and Four were not proven, causing a fatality to Count Five.

It is submitted that there is a difference between 18 U.S.C. § 1623 and 18 U.S.C. § 1621.

Section 1623 requires *two* irreconcilably inconsistent statements under oath. Under this statute the Government need not prove which was false. Section 1621 requires corroboration ("the two witness rule"). Bucci physically was incapable of conspiracy to make the required two irreconcilably inconsistent statements.

CONCLUSION

Based on the foregoing, Appellant Bucci respectfully requests this Honorable Court dismiss the judgment and verdict or in the alternative grant a new trial.

Respectfully submitted,

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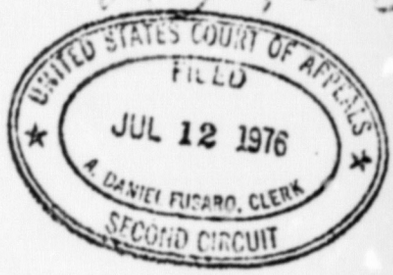
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



UNITED STATES OF AMERICA
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v.

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Defendant, Appellant

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AFFIDAVIT OF SERVICE

I, Andrew A. Bucci, first being duly sworn on oath, depose and say, that I have mailed 2 copies of the Brief for Defendant-Appellant (From Judgment and Sentence) No. 76-1200 and 2 copies of the Appendix No. 76-1200 to Paul Coffey, Federal Building, 450 Main Street, Hartford, Connecticut this 12th day of July, 1976.

Andrew A. Bucci

Subscribed and sworn to before me this 12th day of July, 1976.

Notary Public